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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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435

No. ~~128 Misc.~~

A. ELWOOD NORTH,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

To the Honorable Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Florida, entered in the above-entitled cause on October 21, 1952.

Opinions Below

The opinion of the Supreme Court of Florida is reported in 65 So. 2d 77 (R. 1582). The opinion of the Supreme Court of Florida denying the petition for rehearing is reported at 65 So. 2d 94 (R. 1635). The dissenting opinion is reported at 65 So. 2d 101 (R. 1650).

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3), this being a case involving rights secured under the Fourteenth Amendment to the Constitution of the United States. Petitioner was convicted of first degree murder in the Circuit Court of Polk County, Florida, and was sentenced to death therefor on October 5, 1951 (R. 1565). That judgment was affirmed by the Supreme Court of Florida on October 21, 1952, Justice Terrell dissenting (R. 1582). Petition for rehearing was denied on April 10, 1953, Justice Terrell and Justice Hobson dissenting (R. 1635-1650). On June 24, 1953, Mr. Justice Jackson issued an order extending the time for filing a petition for a writ of certiorari to August 30, 1953.

The Federal Constitutional questions upon which review is here sought were timely raised in the trial court, particularly by Ground 27 of petitioner's motion for a new trial (R. 1298, 247, 1284, 1286, 1292, 1293, 1294, 1298); upon appeal, particularly by Grounds 20, 21, 23, 26 and 2 of petitioner's Grounds of Appeal (R. 1572-1574, 1569); and by a petition for rehearing, particularly Grounds 23, 24 and 25 thereof (R. 1631, 1632). The judgment of the Supreme Court of Florida affirming petitioner's conviction necessarily involved a determination of those Federal questions adversely to petitioner. Furthermore, in order to eliminate any ambiguity in the record, the Chief Justice of the Supreme Court of Florida has ordered that a Certificate of Clarification executed by him be made a part of the record in this case. This Certificate states that each of the contentions based upon the Federal Constitution and presented to the Florida Supreme Court by the petition for rehearing were "considered and explicitly overruled by said Court by its Order of April 10, 1953, denying the Petition, which Order is to be interpreted and considered

as holding against the Appellant's contention that his rights under the Fourteenth Amendment to the Constitution of the United States were violated" (R. 1665). See *Lisenba* v. *California*, 314 U. S. 219, 221-222.

Questions Presented

Was the petitioner denied a fair and impartial trial conducted in accordance with the procedural safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment when

(1) a religious evangelist was permitted to meet secretly with the jury on two separate occasions during the course of the trial, to address the jury in a manner prejudicial to the petitioner, and to give the jury "divine guidance" against recommending mercy for the petitioner if they found he was guilty;

(2) one of the jurors who brought in a verdict of guilty without recommendation of mercy had already formed a fixed opinion that the petitioner was guilty prior to the trial, which opinion he had repeatedly expressed before the trial, contrary to his testimony on voir dire examination; and

(3) the trial of petitioner was conducted in an atmosphere of passion and prejudice as a consequence of the trial Court's denial of petitioner's motion for a continuance, which motion was made after widespread and inflammatory publicity had made it impossible to secure an impartial jury at that time?

Statement

On July 25, 1951, the Grand Jury of Polk County, Florida, indicted petitioner for the first degree murder of Mrs. Betty Albritton, petitioner's fifty-seven year old business partner and the widow of his late friend and

partner (R. 5). It was charged that the petitioner had inflicted death by beating, choking and assaulting the deceased.

Immediately the press began to give the case an unprecedented amount of publicity unfavorable to petitioner (R. 250, 1574). The permeating and harmful effect of this coverage by the press is disclosed by the statements of the twenty-four jurors examined on voir dire through September 4, 1951 (R. 60-245). Of these, all but one had read about the case in the newspapers and well over half (i.e. fourteen) admitted that they had already formed an opinion concerning petitioner's guilt (R. 62, 81, 105, 113, 126, 146, 153, 172, 176, 195, 205, 214, 230, 236). When the petitioner challenged for cause one of these jurors who, by admission, had already formed an opinion about petitioner's guilt, the trial Court refused to sustain the challenge (R. 153, 158-159).

In this atmosphere, eleven tentative jurors were selected when Court adjourned on September 4, 1951. By agreement of counsel for the State and petitioner, these jurors were permitted to return to their homes for that night (R. 246). The next morning, before Court reconvened, the *Tampa Morning Tribune*, a newspaper of widespread circulation in Polk County, published and distributed a highly inflammatory and prejudicial front-page article (R. 250-a). The headline of the article referred to Mrs. Albritton's "slaying." The question of whether the widow had in fact been slain or had actually died of natural causes was the basic question at issue between the State and petitioner, to be determined at the trial. The article continued, stating that the petitioner had killed his second wife in 1943 with a blast from a pump gun, that the authorities were currently investigating this previous killing, and that the charges against the petitioner included the *poisoning* of Mrs. Albrit-

ton. Since Mrs. Albritton had eaten some candy given to her by petitioner prior to becoming ill on the night of her death (R. 374, 830), the injection of the suspicion of poisoning, which the State never charged, was most injurious, particularly on the question of premeditation.

Convinced that a fair trial could not be had after such an inflammatory article, coming after the most wide spread publicity of a homicide case in Polk County's history (R. 250), petitioner's attorneys moved for a continuance of the trial to a later date "in order that the prejudicial effect of said news article will subside" (R. 251).

Without disputing the factual allegations of the motion, the trial Court summarily denied it (R. 251). Thereafter, upon evidence entirely circumstantial in character, the jury returned a verdict of guilty of first degree murder without recommendation of mercy (R. 1282).

The day after the jury returned its verdict, petitioner learned for the first time, from the local newspaper, that members of the jury had sent "for a minister to call for divine guidance as they considered the case," and that the bailiffs had permitted the Rev. Shelton Jones, a Baptist preacher, to meet with the jury in secret session to provide such guidance (R. 1302).

From other sources, it was also learned that one of the jurors, Juror Bloodworth—who had testified on voir dire that he had neither formed nor expressed an opinion concerning petitioner's guilt (R. 163-164)—had actually repeatedly expressed before trial a fixed and bitter opinion that the petitioner was guilty of the crime charged and should suffer the supreme penalty.

Petitioner made a timely motion for a new trial, based in part upon the above circumstances and the previous denial of his motion for a continuance, and claiming that as a result of these matters his right to a fair and impartial

trial under the Federal Constitution had been violated (R. 1284, 1286, 1293, 1294, 1298). Testimony was taken by the trial Court on the motion. This testimony showed that it was impossible to reconstruct even a semi-accurate picture of what had transpired while the preacher Jones was with the jury. Many jurors stated they did not remember (R. 1515, 1526, 1536, 1542, 1549). However, the testimony of some did establish that one of the jurors was acquainted with the Rev. Jones, who had held evangelistic services at his church (R. 1472); that on two occasions during the trial the bailiffs had allowed the Rev. Jones to meet privately with the jury (R. 1473, 1517, 1542); that this was done in the absence of, without notice to, and without consent of the accused (R. 1486, 1487, 1542); that the Rev. Jones had read to the jury somewhere from the Book of Proverbs in the Bible (R. 1518); that he read "something out of the Bible" (R. 1529); that he read the 37th Psalm to them and stressed the 5th verse thereof out of context (R. 1518, 1474); that he asked for divine guidance of the jurors (R. 1478, 1519); that he asked all the jurors to become Christians (R. 1489), and that he prayed with them (R. 1474).

Portions of Psalm 37, which the evidence clearly showed was read to the jury, are as follows:

> "Fret not thyself because of evildoers, neither be thou envious against the workers of iniquity. *For they shall soon be cut down like the grass, and wither as the green herb.*" V. 1, 2. (Emphasis added.)
>
> "Commit they way unto the Lord; trust also in him; and he shall bring *it* to pass." V. 5. (Emphasis not added.)
>
> ". . . when the wicked are cut off, thou shalt see *it*." V. 34. (Emphasis not added.)
>
> "But the transgressors shall be destroyed together; and the end of the wicked shall be cut off." V. 38.

"But the wicked shall perish, and the enemies of the Lord shall be as the fat of lambs: they shall consume; into smoke shall they consume away." V. 20.

It is now known just exactly what portions of the Book of Proverbs were stressed to the jury by the Rev. Jones. A mere glance at the Book, however, shows that many parts would be highly prejudicial to one on trial for his life. For example:

"But the wicked shall be cut off from the earth, and the transgressors shall be rooted out of it." Ch. 2:22.

"For there shall be no reward to the evil man; the candle of the wicked shall be put out." Ch. 24:20.

"He (the wicked) shall die without instruction; and in the greatness of his folly he shall go astray." Ch. 5:23.

"A man that doth violence to the blood of any person shall flee to the pit; *let no man stay him.*" Ch. 28:17. (Emphasis added.)

In Florida, the question of whether one convicted of first degree murder is sentenced to death or to life imprisonment depends upon whether a majority of the jury recommend mercy. F.S.A. 919.23. In short, the jury decides whether the life of a person they have determined is an "evildoer" shall be "cut down like the grass" or not.

In regard to Juror Bloodworth, the testimony at the hearing upon petitioner's motion disclosed the following:

One witness testified he had heard Bloodworth say, before trial, that he thought petitioner was guilty and "hoped he burnt for it." (R. 1344.)

Another witness testified he had heard Bloodworth say, before trial, that he thought petitioner was guilty and that it would take more arguments than he could see to change it. (R. 1321.)

Another testified to hearing Bloodworth say, before trial,

"North sure as hell killed that woman but he will never be convicted." (R. 1368.)

Still another witness testified that Bloodworth told him, before trial, "Well, I tell you. I think the man (petitioner) is guilty." (R. 1386.)

A fifth witness testified that Bloodworth said, before trial, "I can't serve on that jury because I believe he is guilty. The son of a gun is guilty. All the people in Polk County couldn't change my mind." (AR. 1410.)

Juror Bloodworth did not specifically deny making the above statements. He testified that he did not remember making them (R. 1439, 1440, 1442, 1443, 1444, 1445). He said that he was a barber (R. 1436) and there was "a lot of barbershop gossip going on all the time, so I just wouldn't know of any statement that I made." (R. 1439.) He admitted it was possible that he had expressed before trial an opinion that petitioner was guilty (R. 1445).

The trial court nevertheless denied the motion for a new trial and sentenced the petitioner to death by electrocution. (R. 1564, 1565). On appeal, the Supreme Court of Florida affirmed the judgment and denied a petition for rehearing, two justices dissenting.

Reasons for Granting the Writ

1. By refusing to grant a new trial, the trial Court and the Supreme Court of Florida have held that a man's life may be taken from him by procedures fundamentally unfair and contrary to the very concept of justice as understood in Anglo-American jurisdictions. Cf. *Rochin* v. *California*, 342 U.S. 165. The action of an officer of the trial Court, in permitting a preacher to give "divine guidance" to the jury during its deliberations, without the knowledge of the accused and beyond his presence, is no more nor less than a reversion to the practices followed by medieval ecclesiastical tribunals, long since condemned and universally decried by

civilized, English-speaking peoples of today. Due process of law commands that no accused shall be sent to his death in this day and age and in this Nation by such a practice.

2. The Sixth Amendment to the Federal Constitution specifically provides that an accused shall enjoy the right to a public trial, by an *impartial* jury, and to be *confronted* with the witnesses against him. It is submitted that these particular rights expressed in the Sixth Amendment are basic to and implicit in the concept of ordered liberty, particularly where a man is on trial for his life. *Re Oliver*, 333 U.S. 257; *Tumey* v. *Ohio*, 273 U.S. 510; *Snyder* v. *Massachusetts*, 291 U.S. 97, 106. As such, these rights are protected by the Due Process Clause of the Fourteenth Amendment against infringement by the States. *Palko* v. *Connecticut*, 302 U.S. 319; *Adamson* v. *California*, 332 U.S. 46, 54. By permitting a preacher to address the jury in this case behind closed doors and in the absence of the accused, petitioner's rights under the Fourteenth Amendment to a public trial, to confront the witnesses against him, and to an impartial jury were denied.

3. Petitioner's right under the Fourteenth Amendment to an impartial jury was denied by the trial Court's refusal to grant petitioner's motion for a continuance and by the presence on the jury of Juror Bloodworth, who had falsely stated on voir dire examination that he had no opinion and had expressed no opinion concerning petitioner's guilt.

4. In view of the above, the Florida Supreme Court has decided important Federal Constitutional questions in a way contrary to applicable decisions of this Court. At the very least, serious questions concerning the limitations of the Due Process Clause of the Fourteenth Amendment upon the conduct of criminal proceedings by the States are raised. The resolution of these questions by this Court will be of importance not merely to petitioner, but to the administration of justice throughout the Nation.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

This case concerns basic procedural safeguards for the protection of those accused of crime—safeguards which have been deeply cherished and almost uniformly followed in Anglo-American jurisdictions. Without them, the administration of justice in the United States is not only more apt to suffer from actual abuse; it will necessarily be degraded by the mere appearance of unfairness. Specifically, these safeguards are the following:

1. The right of an accused to a public trial in open court. *Re Oliver*, 333 U. S. 257.
2. The right of an accused to confront and examine witnesses against him. *Re Oliver, supra; Snyder* v. *Massachusetts*, 291 U. S. 97, 106; *Shepherd* v. *Florida*, 341 U. S. 50, 52, concurring opinion.
3. The right of an accused to be tried by an impartial or neutral tribunal. *Tumey* v. *Ohio*, 273 U. S. 510; see *Fay* v. *New York*, 332 U. S. 261, 289.

These are rights which no totalitarian dictatorship can afford to indulge; they are rights no nation dedicated to personal liberty can afford to revoke.

Petitioner's right to a public trial in open court and to confront those who spoke against him was denied by the action of an officer of the trial court, the bailiff, in permitting a religious evangelist to address the jury in secret on two occasions, without notice to the accused and out of his presence. Petitioner's right to be tried by an impartial tribunal was denied by the presence of Juror Bloodworth on the jury and by the action of the trial court in denying petitioner's motion for a continuance.

Despite these drastic departures from traditional Anglo-American safeguards, the Supreme Court of Florida has affirmed petitioner's conviction and his sentence to death. In doing so, the Supreme Court of Florida relied upon its

conclusion that the appearance of the Rev. Jones before the jury on two occasions had no effect upon the jury and that therefore the petitioner was not prejudiced by a practice which the Court conceded "cannot be too severely condemned" and which it described as "irregular". 65 So. 2d 77, 86. This conclusion, we respectfully submit, was a mere speculative assumption based upon inadequate factual information and unwarranted by the record. This Court, of course, is not bound by such a conclusion.

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are based."
>
> *Niemotko* v. *Maryland*, 340 U. S. 268, 271; see also *Feiner* v. *New York*, 340 U. S. 315, 316.

A re-examination of the evidentiary basis in the record in this case clearly shows, first of all, that neither this Court, the lower courts, nor petitioner will ever know the complete story of what took place behind the closed doors of the jury room while Rev. Jones was addressing his remarks to the jury. This is not because of any lack of diligence upon petitioner's part to dig out every fragment of information he could concering those secret sessions. It results from that common human fraility: forgetfulness. A mere perusal of the record shows that juror after juror, when asked days later what the Rev. Jones had said to them, simply replied, "I couldn't tell you to save my life" (R. 1515), or "I don't remember his exact remarks" (R. 1518).

This inability to reconstruct exactly what occurred is not surprising. It is the natural and inevitable consequence whenever a departure is made from this Nation's accepted practice of conducting criminal trials in open court with notice to the accused so that he may be present to confront

those who speak against him, and so that his counsel may cross-examine and meet the opposition "with evidence, arguments, and requests for instructions, and at least preserve his objections on the record." *Shepherd* v. *Florida*, 341 U. S. 50, 52, concurring opinion.

In this case, of course, petitioner had no opportunity to object, to cross-examine the Rev. Jones, to request instructions, or to counteract in any way the influence which the evangelistic preacher may well have exerted upon the jury. Petitioner did not learn of the secret meetings until after the jury had brought in its verdict of guilty without recommendation of mercy. Surely, if the trial Court itself had expressly permitted the Rev. Jones, over petitioner's objection, to retire behind closed doors with the jury and address them out of petitioner's presence, the denial of due process would be patent. *Re Oliver, supra.* Yet even such obvious error by the trial Court would not have so completely stripped petitioner of all his rights or left him so helpless as did the high-handed, hidden action of the bailiff in this case.

Moreover, the record shows without contradiction that highly prejudicial matters were spoken to the jury by the Rev. Jones. Several jurors agreed, for example, that the Rev. Jones read them a Psalm, clearly identified by one as the 37th (R. 1518, 1474). Thus, as a man of God giving divine guidance, the Rev. Jones chose to stress to the jury a passage from the Bible replete with statements that evildoers should be "cut down", that "transgressors shall be destroyed", that "the wicked shall perish", and that the wicked shall "consume away" into "smoke". He stressed the fifth verse particularly, which counsels that the Lord "shall bring *it* to pass."

What effect this guidance of the Rev. Jones may have had upon the jury's determination that petitioner was

guilty of the crime charged, we can only surmise. But the effect upon their decision not to recommend mercy for petitioner, once having decided he was an "evildoer", is obvious. Had not the Reverend Jones given them divine guidance that "the wicked shall perish" and "be destroyed"?

Other jurors testified that the Rev. Jones had read from the Bible, and had read from the Book of Proverbs in the Old Testament (R. 1529, 1518, 1536). It was not possible to ascertain precisely which passages were stressed. Presumably it could have been anything in the Bible, from the command in Exodus 21 that for punishment "thou shalt give life for life, eye for eye, tooth for tooth" to the statement in Romans 6:23, "For the wages of sin *is* death."

In dismissing petitioner's contention that such passages from the Bible, stressed out of context, may have influenced the jury against recommending mercy, the Florida Supreme Court simply declared, flatly: "If harmless error did not influence the jury in determining the guilt of the appellant, then it could not influence it in recommending mercy." 65 So. 2d at pp. 100-101. Why not? Respectfully, petitioner must confess his inability to follow the Court's logic. Moreover, this inability and bewilderment is only heightened by another decision of the same Court rendered in a non-capital case only a few days prior to the opinion on rehearing in this case. *Raines* v. *State*, 65 So. 2d 588. In the *Raines* case the trial court, after the jury had been deliberating upon its verdict, excused the jury to go to their respective homes over night and return next morning to renew their deliberations. This was done in open court, and there was no objection made by the defendant or his counsel. Reversing the conviction on the ground that the defendant's trial had not been "conducted with that

degree of fairness and security that the bill of rights contemplates," the Florida Supreme Court then stated:

> "* * * There was no objection raised when the jury was dispersed, nor were counsel consulted. There is no showing in the way of evidence that defendant's rights were prejudiced, *but trials should not be conducted in a way that defendant has good reason for the belief that he was deprived of fundamental rights.* The opportunity was open for tampering with the jury and the temptation to do so was such that *we are not convinced that the appellant's trial was conducted with that degree of fairness and security that the bill of rights contemplates.* * * * It imposes too great a burden upon the defendant to produce evidence of prejudice to his rights under such circumstances. We think this error calls for reversal." 65 So. 2d at pp. 559-560. (Emphasis added.)

Surely the Bill of Rights, as applied to the States by the Fourteenth Amendment, does not contemplate one standard of fairness and security for defendants in non-capital cases and another, lower standard for those accused of more serious crimes in capital cases.

On the basis of the above, it is submitted that petitioner's Federal Constitutional rights have clearly been denied. He asserted these rights at the first possible moment in the trial Court by his motion for a new trial, particularly Ground 27 thereof (R. 1298); on appeal, particularly by Grounds 20, 21, 23, 26 and 2 (R. 1572-1574, 1569); and by his petition for rehearings, particularly Grounds 23, 24 and 25 thereof (R. 1631, 1632). The Supreme Court of Florida fully considered petitioner's contentions based upon the Fourteenth Amendment and denied each of them, as evidenced by the Certificate of Clarification executed by the Chief Justice of that Court (R. 1665). Petitioner now respectfully prays that a Writ of Certiorari be directed to

the Supreme Court of Florida, in order that the errors complained of may be reviewed and corrected.

This — day of August, 1953.

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IN THE SUPREME COURT OF THE
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A. ELWOOD NORTH,

PETITIONER,

vs.

THE STATE OF FLORIDA,

RESPONDENT

BRIEF IN BEHALF OF THE RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 435

A. ELWOOD NORTH,
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vs.

THE STATE OF FLORIDA,
RESPONDENT

BRIEF IN BEHALF OF THE RESPONDENT

QUESTIONS PRESENTED

(The petitioner presents what he deems to be certain questions raised by the record in this cause. It is our contention that these questions fall completely wide of the mark from a factual as well as a legal standpoint. We shall not, however, attempt to reshape the questions for we fully believe that there is no question before this Court upon which this Court should reverse the Courts below. We shall exhibit in our Statement of the Case and in our Argument just wherein the record fails to support the factual statements made by the petitioner.)

Was the petitioner denied a fair and impartial trial conducted in accordance with the procedural safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment when

(1) a religious evangelist was permitted to meet secretly with the jury on two separate occasions during the course of the trial, to address the jury in a manner prejudicial to the petitioner, and to give the jury "divine guidance" against recommending mercy for the petitioner if they found he was guilty;

(2) one of the jurors who brought in a verdict of guilty without recommendation of mercy had already formed a fixed opinion that the petitioner was guilty prior to the trial, which opinion he had repeatedly expressed before the trial, contrary to his testimony on voir dire examination; and

(3) the trial of petitioner was conducted in an atmosphere of passion and prejudice as a consequence of the trial Court's denial of petitioner's motion for a continuance which motion was made after widespread and inflammatory publicity had made it impossible to secure an impartial jury at that time?

STATEMENT OF THE CASE

With regard to the three questions presented in the petition and brief in support thereof we should like to clarify and correct certain material points. On page 5 of the petition petitioner states "without disputing the factual allegations of the motion the trial court summarily denied it (R. 51)." A reading of the order which extends from page 251 in the record to page 253 of the record shows clearly that the trial court did much more than summarily deny a continuance. The trial court pointed out that it did not appear whether or not any of the prospective jurors or tentative jurors had read the complained of issue of the Tampa Tribune and, further, that the panel was still open for re-examination of each

and every individual juror tentatively seated. The court went on to state "If it appears that any juror does not qualify to the satisfaction of counsel for defendant with regard to any influence or any inerasable impression upon such juror made by this article of the *Tribune*, the Court will excuse such juror for cause from sitting in this case. Every juror tentatively in the box might possibly be excused for cause if it is shown that because of this article he might be influenced to the very least degree in making or bringing in a verdict in the case."

Thereupon one of the jurors who had been tentatively seated the day before was questioned by defense counsel and was excused for cause (R. 253, 254).

Another prospective juror (Albritton) then was questioned. The State Attorney asked the jurors in the box the following question: "In your frame of mind this morning, can you stand fairly and impartially as between the State of Florida and the defendant if accepted upon this jury?" (R. 254). Each juror indicated that he could except one, Hooker, who was promptly excused. (R. 254-255).

Thereafter, the selection of the jury proceeded until an impartial jury of twelve was accepted by both sides. The appellant resolutely and completely abstained from availing himself of the opportunity thus afforded him by the judge; he did not interrogate the jurors about said newspaper article (R. 253-326).

Further along in the petitioner's alleged statement of the case he gets into a good deal of inference and argument which does not reflect what really occurred with regard to Reverend Jones as the record demonstrates.

At the hearing on the motion for a new trial the bailiff Johnson testified (and the question asked him by defense counsel impliedly conceded) that the court authorized a bailiff to take the jurors to church when all of them requested it; and that this permission was given in the presence of defense counsel. (R. 1485-1486). No claim was made by the petitioner that he or his counsel objected to giving such permission.

The jurors couldn't agree as to what church to attend; so they compromised by agreeing to ask a preacher to grace the table for them (R. 1475).

The preacher met with the jury twice, once on Sunday morning and once on Wednesday morning before the case went to the jury (R. 1517).

The preacher stayed with the jury three minutes and twenty seconds the first time, and three minutes and forty seconds the second time. The bailiff timed him with a stop watch. (R. 1488).

The preacher, Jones, was eating breakfast in the cafe where the jurors were also eating in a private room. The juror Grigsby recognized him and asked the bailiff to call him over to bless the table. (R. 1493-1494). [Grigsby was a Methodist (R. 1492) and Preacher Jones was a Baptist (R. 1502). Grigsby had seen Jones twice, at revivals conducted by Jones in a Baptist Church sometime before. There were two revivals and Grigsby had attended each of them one time. Grigsby had never met Jones personally and had not had any close contact with him. (R. 1493-1501-1502).]

The preacher came into the closed restaurant room

where the jurors were eating (R. 1519-1520). The bailiff was present at all times (R. 1488).

The preacher did not mention anything in the case or which represented the case (R. 1488). He didn't discuss the case in any way and didn't refer to it directly or indirectly (R. 1513-1514).

The preacher read from the Bible and graced the table with a prayer (R. 1473-1474).

The jurors were generally agreed that the preacher read from the Psalms. However, the juror Gibson pinned it down to a closer point. Gibson testified that the first time, Sunday, the preacher read a verse from Proverbs, Gibson being unable to recall just what it was and that the second time (which was Wednesday) the preacher read from the 37th Psalm and stressed the fifth verse out of context. Gibson said that nothing that the preacher read or said was in any way connected with the North case or with the jurors' duty in connection with the case (R. 1518).

The preacher didn't talk with any of the jurors at all (R. 1494).

The bailiff (who was present at all times) testified that the preacher didn't read or say anything about the duties or tasks that lay ahead of the jurors (R. 1489-1490); and that the preacher never mentioned a word about the jurors or anybody in person (R. 1489). And juror Beamon also testified that the preacher didn't say anything about a juror; that juror wasn't mentioned. (R. 1527). And juror Bloodworth testified that the preacher said nothing about their duties as jurors. (R. 1533-1534).

On the other hand juror Bryan testified that the

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preacher prayed. "God give these men your divine guidance in their duties" (R. 1478). And juror Gibson also testified that the preacher asked for divine guidance. (R. 1519).

The statement of the case in the petition also somewhat twists the situation with regard to the alleged bias of one of the jurors.

The petitioner's motion for new trial alleged that, prior to the trial, juror Bloodworth had formed an expressed and fixed opinion that the petitioner was guilty, and that Bloodworth had that fixed opinion when accepted upon the jury; and that, upon voir dire, he testified that he had never formed or expressed any opinion as to the petitioner's guilt or innocence. (R. 1294-1295).

The State traversed the allegations of said motion (R. 1309). A hearing was had at which testimony was introduced for and against said allegations concerning the juror Bloodworth.

After hearing and considering said testimony the trial judge denied the motion. Such denial necessarily operated as a finding that the petitioner had not carried his burden of proving the allegations as to Bloodworth.

The petitioner's witness Bost testified that, after the petitioner was arrested but before he was indicted, he, Bost, was in the barber shop where Bloodworth was employed as a barber and overheard a conversation in which Bloodworth said that in his mind the petitioner was guilty and that it would take more argument than he could see to change it. (R. 1319-1321). Although Bost partly followed the case in the newspapers and noted that Bloodworth was listed as a prospective juryman in the case

before Bloodworth was ever called over to the Court, and although Bost said that it made him remember the conversation that he had heard, he didn't think enough of it to go and report it to a proper official when he saw Bloodworth's name come out as a prospective juror, and he didn't report what he had heard to anyone. (R. 1333-1334). Also, Bost was in disagreement with the verdict, based on what he had read in the newspaper (R. 1337) and he made an affidavit about that matter for the purpose of helping the petitioner get a new trial (R. 1339).

The petitioner's witness Noah testified that in Clarke's poolroom after the petitioner was arrested and before he was indicted, Bloodworth said that he believed that the petitioner was guilty and he hoped that the petitioner burned for it. (R. 1344). Noah, too, was in disagreement with the jury's verdict (R. 1349) and, after the trial he went to see defense counsel without being requested to go, because he wanted to see justice done (R. 1350). Noah's said testimony was negatived by the State's witness Trulock who was in the pool game with Noah and Bloodworth at the time Noah claimed Bloodworth expressed said opinion as to the petitioner's guilt. (R. 1420-1435). [It is interesting to note Trulock's testimony that not only did Bloodworth express no opinion that the petitioner was guilty but that after Noah departed, Trulock, himself, asked Bloodworth what he thought of the North case and Bloodworth answered "Big'un, I wouldn't say either way. I would wait til twelve men decides the case and then I will talk after then." (R. 1422-1424)].

The petitioner's witness Davis testified that, about two weeks after Mrs. Albritton was buried, he was in the barber shop where Bloodworth worked and had heard Bloodworth say that the petitioner sure as hell killed that woman but would never be convicted (R. 1368).

Davis had a doubt in his mind about whether the petitioner was guilty (R. 1379). After the jury was drawn, Davis knew from reading the papers that Bloodworth was on the jury (R. 1369). Nevertheless Davis didn't tell anyone about hearing Bloodworth make such a statement until he talked to defense counsel, Haynsworth, the Saturday before the hearing on the motion for a new trial except that he did tell one man named Tibado (R. 1377-1378).

The petitioner's witness Bolden testified that, in the barber shop (R. 1385), before the petitioner was indicted, he asked Bloodworth what the latter thought of the case and Bloodworth answered that he thought North was guilty (R. 1386).

The petitioner's witness Grant testified that, after the petitioner was arrested but before he was indicted, Grant was in the cafe and heard Bloodworth say that he couldn't serve on the jury because he believed that North was guilty, that the son-of-a-gun was guilty, and that all of the people in Polk County couldn't change his, Bloodworth's mind (R. 1409-1410).

The juror Bloodworth testified that he didn't remember ever having expressed an opinion, a fixed opinion, as to the petitioner's guilt or innocence at any time before he was sworn as a juror in the case; that he had no fixed opinion that he could express (R. 1440); that he knew none of the facts of the case before he was sworn as a juror except what little casual reading he did from the newspapers and just general gossip (R. 1440); that at the time he was examined at the trial, he was not conscious of ever having formed or expressed an opinion as to the petitioner's guilt or innocence; that, when he was examined at the trial, he absolutely had a fair and impartial mind; that "my mind was open when I took the stand

here and the oath. I told the truth. That my mind was open. That the State would have to prove to my knowledge before I would deem him guilty." (R. 1443-1444).

Bloodworth testified that he didn't remember stating in front of the petitioner's witness, Bost, that he thought the petitioner was guilty (R. 1449); that he didn't recall having any conversation with the petitioner's witness Noah about the case (R. 1441), and that he didn't remember having said to Noah or anybody, that he believed that the petitioner was guilty and hoped he burned for it (R. 1444); that he didn't have any conversation that he remembered in which he expressed an opinion as to the petitioner's guilt or innocence in the presence of the petitioner's witness Davis (R. 1442); that he positively had never made the statement that he remembered that the petitioner sure as hell killed that woman but never would get convicted (R. 1442); that he didn't remember ever having made the statement to the petitioner's witness Grant or to anyone in the Cafe or ever, that he couldn't serve on the jury because he believed the petitioner was guilty and all the people in Polk County couldn't change it (R. 1443).

Bloodworth testified that he didn't remember agreeing with his customers if they said they thought the petitioner was guilty but that it was possible that he might have done so; that he talked to a lot of people who came into the shop every week, and the people were continuously discussing the case there around him when he cut their hair (R. 1449).

ARGUMENT

AS TO POINT ONE, CONCERNING PREACHER JONES AND THE JURY.

The rule governing such matters is set out in the annotation in 22 A.L.R. 254, et seq., under the heading "Communications Between Jurors and Others as Ground for New Trial or Reversal in a Criminal Case". We quote from page 255 of said annotation as follows:

> "While there are some cases in which great strictness has been observed, the rule sustained by the great weight of authority is that a verdict will not be disturbed because of a conversation between a juror and a stranger, where it was not prompted by a party, and it does not appear that any injustice was done to accused; or, at least if it appears that he was not prejudiced."

To the same effect is the annotation in 62 A.L.R. 1466.

The only case cited by the petitioner below in his brief before the Supreme Court of Florida which dealt with communications between jurors and outsiders was Shaw v. State, Ga., 9 S.E. 768.

The case at bar is completely different from the Shaw case. Here, the jurors had permission to attend church. Here the preacher was not a witness for the State, and did not help select the jury, and was not an active prosecutor, and had no interest in the case, and was not the pastor of any of the jurors, but was known to only one juror, who had heard him preach twice but had never met him personally.

Even a casual reading of the Shaw case, which was the only authority cited to the Supreme Court of Florida for the proposition there advanced and now advanced

here shows that the Shaw case and the present case are absolutely incongruous.

This proposition has never been before this Court. However, the problem has been presented to the courts of last resort in several jurisdictions and none of these courts under similar circumstances, have held that the basic rights of the defendant were prejudiced.

In State v. Kinsauls, (N.C.) 36 S.E. 31, the jurors were allowed to attend church with the consent of the defendant. The preacher spoke and prayed about the case. The Supreme Court of North Carolina disapproved the practice of permitting jurors to attend church but affirmed the conviction finding nothing prejudicial about what the preacher said. We quote briefly from that case as follows:

> "The matter complained of is as stated in Ex parte affidavits for the defense, the minister said 'there are men here who have in their hands the life of a poor man now on trial. You ought to be careful, and if he is guilty, say so; and if he is not guilty, say so. Do your duty before God and your country;' and in his prayer he said 'Now, Lord, we are going to offer a special petition to Thee that this jury may give him a fair and impartial trial, and, if guilty, say so and, if not guilty, say so,' and made a special appeal to God in behalf of said prisoner, praying for a 'fair trial to him.' It would have been, of course, propriety for a man of God to have made no reference to a matter which the laws of his country had entrusted to the unbiased decision of the jury, but it is impossible to find in the above anything which is prejudicial to the prisoner. In view of the occurrence, it would be well, however, for trial justices to hereafter avoid giving similar opportunity for complaint."

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Even if the trial judge in the case at bar had found preacher Jones had prayed for divine guidance for the jurors in their duties, such a prayer would have been no more prejudicial than what the preacher said in his talk and prayer in the said Kinsauls case, supra.

In State v. Pancoast, (N.D.), 67 N.W. 1052, the jury attended church with the permission of counsel for both sides. In affirming the Supreme Court of North Dakota held almost exactly what the Supreme Court of North Carolina held in the Kinsauls case.

In Chilton v. Commonwealth, (Ken.) 186 S.W. 191, the jurors went to a religious revival. The Kentucky Court of Appeals found nothing prejudicial in what was done or said and affirmed.

The facts in the Chilton case, show a much stronger statement by the minister than we have in the instant case. Yet the Kentucky court found that it was not prejudicial.

It will be noted that in the Chilton case, the Kentucky court said that there might be merit to the claim of prejudice if the minister had made any improper reference (1) to the facts of the case or (2) to the duty of the jury under the circumstances. In the case at bar, the preacher made no improper reference at all; he didn't mention the facts of the case; he made no comment on the jury's duty under the circumstances, and he didn't hint what their duty was (the most that anybody said he did was ask divine guidance for the jurors in their duties, without any suggestion as to the direction in which their duty should lead them).

In Morgan v. U.S., (C.C.A. 7th), 31 Fed. 2d 385, the jury retired to consider its verdict. Then, at the

request of a juror, a Catholic priest was permitted to go into a separate room, shut off from the jurors and from the bailiff, and give communion to said juror. In affirming, the circuit court of appeals said:

> "While the action of the bailiff in permitting this to be done was reprehensible, a violation of his oath as bailiff, and cannot be too severely condemned, we are not able to see how it in any way influenced the jury in their deliberations or affected the verdict returned."

So it is that (1) under the governing law, communications between jurors and preachers do not constitute reversible error when the defendant is not prejudiced thereby; and (2) the evidence shows that nothing was said or done by the preacher involved in the case at bar which prejudiced or could have prejudiced the petitioner.

The petitioner here apparently takes the position that the harm that was done was not the harm which would have caused the jury to bring in a first degree murder conviction, but the harm that was done which might have prevented the jury from recommending mercy. Of course, we submit that there is absolutely nothing in the record to show that the innocuous remarks which had no effect on the jury according to the jury itself, would probably so have affected the jury. Furthermore, as Mr. Justice Mathews who prepared the opinion in the instant case for the Supreme Court of Florida so ably pointed out, at page 100 of the Southern Reporter, containing the opinion (65 So.2d):

> "In this case there was not one single extenuating circumstance to justify a jury in recommending mercy. The appellant was either guilty or he was not guilty. The jury found that he was guilty.

> If this finding by the jury was correct, then a most horrible, inexcusable, premeditated and heinous murder was committed. If harmless error did not influence the jury in determining the guilt of the appellant, then it could not influence it in recommending mercy. When they made the first determination that the appellant was guilty of murder the record shows no extenuating circumstance to justify a recommendation of mercy. When this woman was being murdered, there was no one present to plead mercy in her behalf."

AS TO POINT TWO, CONCERNING THE ALLEGED BIAS OF JUROR BLOODWORTH.

After hearing the testimony of the many witnesses, in the full and open and extensive examination of this question, the trial judge denied the motion for new trial, which operated as a finding against the petitioner's contention that Bloodworth had, prior to the trial, expressed opinions that petitioner was guilty and operated as a finding that Bloodworth was a fair and impartial juror.

The judge's denial of the motion for new trial indicates that he didn't believe the petitioner's witnesses. He saw them, observed their demeanor, and heard them testify. He may well have known them personally. He was in the best position to judge of their credibility. He had the right to disbelieve them.

In addition, the judge had the right to believe Bloodworth's testimony that he didn't remember having made the expressions of opinion attributed to him, and had the right to believe that Bloodworth would have remembered it if he had made said expressions of opinions.

Bloodsworth's testimony that he didn't remember making the expressions of opinion attributed to him was

a sufficient basis for the judge to find Bloodworth didn't make the said expressions of opinion, even though Bloodworth didn't positively deny making them. The case of Irvin v. State, 19 Fla. 872, is in point.

In that case, a motion for new trial supported by affidavits, charged that, previous to the trial, a juror had expressed an opinion as to the guilt of the defendant and had said that if he was on the jury he would hang the defendant. The State presented the juror's affidavit which said that he had had "no recollection of having used the expressions as charged in the several affidavits presented by the defendant on the motion," and that, when he was sworn as a juror he had no opinion as to the innocence or guilt of the accused. The Florida Court approved the sufficiency of the juror's affidavit, despite the fact that he did not positively deny having made the statement which was attributed to him. The court said:

> "Aside from these considerations, Coburn by his affidavit, sets the question at rest. He has no recollection of having used expressions as charged in several affidavits presented by the defendant on the motion. He says he had not informed himself of the circumstances of the killing, that he was sworn as a juror, he had no existing or formed opinion as to the guilt or innocence of the accursed, was absolutely without any previously-formed opinion, without bias or prejudice for the accused. He thus shows himself qualified as a juror when he was sworn."

Bloodworth's testimony in the case at bar was as positive and full as was the juror's affidavit in the Irvin case.

Lamb v. State, 90 Fla. 844, 107 So. 530, is also in

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point. In that case, the juror Fulwood was charged in two affidavits with having formed an expressed opinion as to the defendant's guilt. Fulwood testified that he "had no recollection of ever having formed or expressed any opinion to anyone as to his (the defendant's) guilt or innocence." The trial court held that Fulwood and Stevens (another juror whose impartiality was attacked) were qualified jurors. The Supreme Court of Florida affirmed, pointing out that on the bare record the evidence of the disqualification of either Fulwood or Stevens was not at all convincing, and also saying: "The trial court, after hearing and observing the witnesses in support of their alleged disqualifications, pronounced them qualified, and we think such questions must necessarily be left to the trial judge, who has opportunity to know the witnesses and judge of their credibility. Irvin v. State, 19 Fla. 872; Yates v. State, 7 So. 884, 26, Fla. 484; People v. Taing, 53 Cal. 602; People v. Vasquez, 49 Cal. 560."

In addition we quote from Crosby v. State, 90 Fla. 381, 106 So. 741:

> "After verdict, all presumptions of law are in favor of the juror's competency, and the burden of proof is upon one who attacks it. McGowan v. State, 102 So. 890."

In the opinion of the trial judge, who had opportunity to know the witnesses and judge their credibility, the petitioner did not overthrow the presumptions of law that Bloodworth was a qualified juror, and did not carry his burden of sustaining his attack upon Bloodworth's competency as a juror. We submit that said finding should not be overthrown by this Court, which did not see and hear the witnesses testify and has no opportunity to know them and judge their credibility.

The petitioner cites the cases of Niemotko v. Maryland, 340 U.S. 268, and Feiner v. New York, 340 U.S. 315, as authority for the proposition that this Court should set aside the findings of fact of the trial court as affirmed by the Supreme Court of Florida.

These cases are clearly not in point. For as you pointed out in those cases there was *nothing* in those records upon which to base the findings of fact of the tribunals below.

AS TO POINT THREE, CONCERNING THE NEWSPAPER ARTICLE.

As shown in the statement of the case in behalf of respondent, the petitioner was accorded full opportunity to examine every juror with respect to the said newspaper article, with the understanding that the judge would excuse any and every juror who might be shown by such examination to have read said article and to have become biased or prejudiced against the petitioner by reason of having read it.

The petitioner resolutely abstained from availing himself of this opportunity; he did not ask a single juror about the newspaper article (R. 253-326).

The result is that the petitioner wishes this court (1) to presume that some or all twelve jurors who tried him read said newspaper article, and (2) to pile up on that presumption the further presumption that the reading thereof biased and prejudiced such juror against the petitioner. We can't conceive of this Court doing any such thing. It was the petitioner's burden to make facts appear which show injury. He has made no effort to carry that burden.

In order to constitute a denial of due process "the acts complained of must be of such quality as *necessarily* prevent a fair trial." Lisenba v. California, 314 U.S. 219, 86 L. ed. 166, 180. Here the mere act of the Tampa Tribune in the publishing of the newspaper article (and that is all that the record shows happened) did not necessarily or even probably prevent a fair trial.

The petitioner's brief mentions the publicity given the case before the trial. If he had any complaint on that score he should have made it before entering upon the selection of trial jurors, as required by statutes. See Sections 911.03 and 916.03, Florida Statutes.

The petitioner's brief mentions publicity during the trial. The record shows nothing of the extent or nature of that publicity. Nor does the record show that any of this publicity reached any of the trial jurors.

The petitioner says that, upon said Tampa Tribune article being brought to the attention of the Court, the Court should have ordered the continuance sua sponte.

Why should the Court have ordered the continuance? No reason appears to justify such action. It wasn't shown that any of the venire men had ever read the article, much less become biased by it. The record shows no excitement among the populace or any other reason for delay.

Only 37 venire men were examined on voir dire before a jury of twelve men were accepted by both sides. (R. 60-326). Here is what happened to those 37 venire men:

Peremptorily challenged by state	5
Peremptorily challenged by petitioner	7

Excused because opposed to capital punishment	3
Excused because opposed to bringing in death verdict on circumstantial evidence	1
Excused by mutual consent	1
Excused because of relationship to deceased	1
Excused because of bad health	1
Excused because of bias, prejudice or fixed opinion	5
Excused, reason not clear	1
Sat on trial jury	12
Total	37

This shows clearly that there was no reason for a continuance in this case.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 435

A. ELWOOD NORTH,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now A. Elwood North, Petitioner in the above-entitled cause, and presents this petition for a rehearing of such cause, and, as grounds therefor, respectfully urges the following:

I. The Procedures Followed by the State of Florida Violated the 1st and 14th Amendments to the Constitution of the United States.

II. A Case of First Impression, Involving Grave Constitutional Questions Upon the Resolution of

Which Petitioner's Life Depends, and Involving Problems of Vital and Recurring Importance Throughout the United States, Should Not Be Determined by a One-Line, Per Curiam Decision Containing No Indication of the Grounds for the Decision.

III. This Court Overlooked Its Decision in the Case of *Mattox v. United States*, 146 U.S. 140.

I. The Procedures Followed By the State of Florida Violated the 1st and 14th Amendments.

This is a substantial ground available to Petitioner though not previously presented.

The 1st Amendment, as applied to the States by the 14th, forbids any State from making any law "respecting an establishment of religion" or from prohibiting the "free exercise" of religion.

The record in this case shows without dispute that at the request of Juror Grigsby (R. 1493-1494), the bailiff of the State Court brought a Baptist preacher into the jury's private and segregated dining room to speak to the jury. While there, the preacher read from his Bible and asked the jurors to become Christians (R. 1489, 1519). Thus, the State in this case adopted a procedure whereby jurors, who were gathered together by the State for the purpose of performing a duty imposed upon them by the State, were asked to adopt a particular type of religious faith. It is submitted that such a procedure clearly vio-

lates the "Constitutional standard" of "separation of Church and State." *Zorach v. Clauson*, 343 U.S. 306, 315. As in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, the force of the State was used to promote sectarian religious tenets. This Court in compliance with the commands of the 1st and 14th Amendments should not affirm, especially without discussion or criticism, the State's use of such a procedure in any trial, and particularly not in a capital case. If there is any time when the claims of God and the claims of Caesar should be separated, if there is any time when the wall between Church and State should stand invincibly as a barrier, it is in such a case, involving life and death. To permit a State to inject even the slightest degree of sectarian religion into capital trials is to open the door to abuses which will undercut our most cherished and hard-won liberty: the right to worship God according to our own beliefs.

II. A Case of First Impression, Involving Grave Constitutional Questions Upon the Resolution of Which Petitioner's Life Depends, and Involving Problems of Vital and Recurring Importance Throughout the United States, Should Not Be Determined By a One-line, Per Curiam Decision Containing No Indication of the Grounds for the Decision.

The action of this Court in affirming Petitioner's conviction and sentence to death attracted nation-wide interest. See *Time*, January 25, 1954, p. 23; *Newsweek*, January 25, 1954, p. 27. Many newspapers throughout the country specifically commented on the fact that this

Court issued only an unsigned order with no explanatory opinion. See, e. g., *New York Herald Tribune*, January 19, 1954 (Associated Press Report). This widespread interest underscores the fact that the basic questions involved in this case are of paramount importance to each of the forty-eight States of the United States. They concern the permissible limits within which States may experiment with criminal procedures under the 14th Amendment. If the other forty-seven States of the Union are free to adopt the procedures which the State of Florida employed in this case, it is respectfully submitted that this Honorable Court should inform the other States of this freedom by an opinion giving its reasons for so construing the 14th Amendment, rather than by a per curiam decision: "The judgment is affirmed."

Moreover, the reasons for writing an opinion in this case are especially compelling because this is a case of first impression before this Court. Respondent, the State of Florida, stated in its brief (p. 11) that the problem raised in this case "has never been before this Court." Petitioner so informed this Court at oral argument. Apparently this Court likewise came to such a conclusion, for contrary to its usual practice in rendering per curiam decisions, it failed to cite a single prior opinion as a basis for its ruling.

This Court has repeatedly stated that it is not concerned with the wisdom of State experimentations in the field of criminal procedure, but only with their Constitutionality. The questions before this Court in this case concerned only that basic issue: the Constitutionality of

the procedures by which Petitioner's right to life was taken from him.

Briefly, the procedures followed by Florida were simple. The State charged Petitioner with a crime. It assembled twelve men in a body and committed to that body the responsibility of deciding after a trial whether or not (1) Petitioner was guilty, and (2) if guilty, whether or not he should die for the crime. During the time required to present its case in open court before this body of twelve men (under civilized rules of procedure adequately safeguarding the accused and giving him a chance to defend himself), the State by law isolated the group from all other, extraneous influences — that is, all except *one*, the influence of an itinerant Baptist preacher. Petitioner does not contend that due process requires a State to isolate and segregate a jury in this fashion. But he does submit that if the State chooses to follow such a course, it cannot make exceptions and thereby channel and funnel extraneous influences upon a jury.

Nevertheless, in this case the State of Florida (acting as a State must always act, through its officials) decided to make an exception. In this case, the State of Florida (acting through its bailiff) kept from the jury all extraneous influences except *one* which it deliberately, at the request of one juror, sought out and brought to the jury without notice to Petitioner, without his consent, and without an opportunity for him to be present.

It is this procedure which Petitioner contends does not measure up to the standard of basic fairness pre-

scribed by the due process clause of the 14th Amendment. Yet, it is this procedure in every shocking detail, which the Supreme Court of the United States has affirmed. By its failure to write an opinion this Court has, in effect, adopted the action of the inferior courts as its own, and has given the dignity of the nation's most solemn and august judicial tribunal to each and every phase of the proceedings below, for this was not a mere denial of certiorari, but a decision of this Court. In theory it cannot be said that it would be any less controlling as a precedent than *Marbury v. Madison*, 1 Cranch 137.

It may be argued that such a procedure is not one which Florida ordinarily follows. This is true. But the State did follow it in this case, involving the only life Petitioner has. If the procedure is Constitutional for Petitioner, why would not it be Constitutional for all defendants charged by States with crime?

It may be argued that the bailiff's action was not the action of the State. But the bailiff was an officer of the trial court and an officer of the State; he was acting in his official capacity when he brought the Baptist preacher into the jury's private dining room. Speaking of the 14th Amendment, this Court has stated:

> "Whoever, by virtue of public position under state government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; *and as he acts in the name and for the State, and is clothed with*

> *the State's authority, his act is that of the State.* This must be, or the constitutional prohibition has no meaning." *Ex parte, Commonwealth of Virginia*, 100 U.S. 339, 347; *Neal v. Delaware*, 103 U.S. 370, 397. (Emphasis added.)

It may be true that a violation of due process committed by one State agency may be corrected or prevented by another agency of higher authority. See *Frank v. Mangum*, 237 U.S. 308, 328. But here the violation was accomplished and the trial completed before discovery of its occurrence. It is submitted that the only remedy which could have possibly restored to Petitioner his right to a fair trial in this situation was the granting of a new trial. But this remedy, higher authority in the State of Florida refused to grant.

For the above reasons Petitioner submits (1) that the procedures followed by the State of Florida in this case were not in conformity with due process of law as protected by the 14th Amendment and that the judgment of the Supreme Court of Florida should not have been affirmed; (2) that in any event, a judgment involving grave Constitutional questions, upon the resolution of which Petitioner's very life depends, in a case of first impression and in a case which has attracted nationwide interest — that such a judgment should not be entered without an opinion of the Court or at least the citation of some reason for the judgment.

III. This Court Overlooked Its Prior Decision in the Case of Mattox v. United States, 146 U.S. 140.

The State of Florida in this case cast the full burden of proving actual prejudice upon Petitioner. Thus, the State first called in a preacher to speak to the jury without notice to the Petitioner, without his consent, and without giving him a chance to be present. Then, after Petitioner's conviction and after he had fortuitously discovered that this occurrence happened, the State informs him that he must prove what transpired at a meeting he could not possibly have attended and for which he was in no way responsible, and furthermore, must bear the burden of proof that such events actually prejudiced the jury against him. Instead of this Florida rule, Petitioner submits that the procedural rule which conforms to due process and a traditional American sense of fairness in a situation such as this is the one announced by this Court as applicable to all Federal Courts:

> "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. Hence, the separation of the jury in such a way as to expose them to tampering, may be reason for a new trial, variously held as absolute; or prima facie, and subject to rebuttal by the prosecution; or contingent on proof indicating that a tampering really took place. Wharton, Crim. Pl. and Pr., Secs. 821, 823, 824, and cases cited.

> *"Private communications, possibly prejudicial, between jurors, and third persons,* or witnesses, or the officer in charge, *are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." Mattox v. United States,* 146 U.S. 140, 149-150. (Emphasis added.)

Petitioner met the only burden which he could within reason be expected to sustain in a situation such as this: he showed clearly and conclusively (1) two private communications addressed by a preacher to the whole jury, and (2) that the communications were possibly prejudicial. Indeed, Petitioner submits that he went further and showed conclusively that on the undisputed facts the preacher's two communications to the jury *were* highly prejudicial to him. Yet, nevertheless, the State under Florida law was never called upon to bear any burden of showing the harmlessness of the meeting for which it was responsible.

In the light of the *Mattox* case it is readily seen that each of the cases relied upon by Respondent in his brief on this so-called "preacher point" are clearly distinguishable. The three State cases cited by Respondent (*State v. Kinsauls,* N.C., 36 S.E. 31; *State v. Pancoast,* N.D., 67 N.W. 1052; *Chilton v. Commonwealth,* Ky., 186 S.W. 191) each involved instances wherein the jury attended a church or religious revival open to the public. Thus the communications were open and above-board, not private and clandestine as in the instant case.

Moreover, in two of the State cases the accused had expressly consented to the jury's action beforehand. *State v. Kinsauls*, supra; *State v. Pancoast*, supra. Thus, in those cases the accused had ample notice and an opportunity to be present. If any consent were given in the case at bar, it was admittedly only consent for the jurors to attend a church open to the public if and when they *all* could agree upon which church to attend. Also admittedly, the jurors were not able to so agree (R. 1487).

The only other case relied upon by Respondent in his brief on this point is *Morgan v. United States*, 7th Cir., 31 F. 2d 385, cert. den., 280 U.S. 556. While that case did involve a private, clandestine communication with one juror, it did not involve the other requirement specified in the *Mattox* case: the communication there was clearly one which could not possibly have been prejudicial. As stated in the opinion:

> "The most that the affidavit in the instant case shows is that the [Catholic] priest administered the sacrament of communion to the juror." 31 F. 2d at p. 388.

It is a matter of common knowledge that the sacrament of communion in the Catholic faith is administered in the Latin language and is standardized in form. Thus, in that case it was possible to reconstruct exactly what transpired at the time of the private communication and to show that the occurrence was not possibly prejudicial. Not so in the instant case. Neither the State nor Petitioner was able to discover all that the preacher read or said to the jury, but it was shown that he did read from a Psalm

which states six times that the wicked shall be cut off or cut down and refers eleven times to the destruction of evil doers. Indeed, the circumstantial evidence of *actual* prejudice (to say nothing of *possible* prejudice) is far stronger than the circumstantial evidence upon which Petitioner was found guilty.

CONCLUSION

Upon the foregoing grounds, Petitioner respectfully prays that this Honorable Court grant a rehearing in this cause and order that this case be set down for re-argument.

In the alternative, and only in the event this Court sees fit to deny this petition for rehearing, Petitioner prays that this Honorable Court enter an order vacating its per curiam decision and its order granting the petition for certiorari in this case and substitute therefor an order denying the petition for certiorari so that this Court will be free at some future time, when perhaps the pressure of judicial business will permit more leisure for deliberation, to consider these same or similar questions, should they arise again, unhampered by a silent, enigmatic precedent.

Respectfully submitted,

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By_____
Of Counsel

BLEED THROUGH POOR COPY

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, but in the interests of justice.

Of Counsel

I hereby certify that a copy of the foregoing petition for rehearing was served upon Respondent, the State of Florida, by mailing of copy thereof, postage prepaid, to the Attorney General, State of Florida, Tallahassee, Florida, this 1st day of February, 1954.

Of Counsel

No. 435. NORTH *v.* FLORIDA. Certiorari, 346 U. S. 864, to the Supreme Court of Florida. Argued January 12, 1954. Decided January 18, 1954. *Per Curiam:* The judgment is affirmed. *Claude Pepper* argued the cause for petitioner. With him on the brief were *C. Jay Hardee* and *John R. Parkhill*. *Bart L. Cohen*, Assistant Attorney General of Florida, argued the cause for respondent.

With him on the brief were *Richard W. Ervin*, Attorney General, and *Reeves Bowen*, Assistant Attorney General. Reported below: 65 So. 2d 77.